82-5977

3

82-5977

No. 83 -

IN THE

SUPREME COURT OF THE UNITED STATES

January Term, 1983

Supreme Court, U.S.
FILED
JAN 3 1983
ALEXANDER L. STEVAS
CLERK

JAMES DOUGLAS HILL,

Petitioner

-vs-

STATE OF FLORIDA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BARNEY ROSENSTEIN
2431 Riverbluff Parkway
Sarasota, FL 33581

(813) 922-0951

Attorney for Petitioner

QUESTIONS PRESENTED

1. Whether the Supreme Court of Florida, in affirming the death sentence in this case has adopted such broad and vague construction of the Florida Statute (Sec. 921.141 (b) (1) so as to violate the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. Whether warrantless electronic interception by police officers of conversations between Peticioner and an informant in Petitioner's enclosed backyard to his home violated his Fourth Amendnent rights under the Constitution of the United States.

TABLE OF CONTENTS

	Page
Questions presented	i
Cases cited	iii
Citation to opinion below	1
Jurisdiction	1
Constitutional Provisions involved	2
Statement of the Case	3
How Federal questions were raised and decided below	11
Reasons for granting the Writ	17
1. The Court should grant certiorari to consider whether the denial of the motion to suppress to preclude the admissibility of the electronic tapes was a violation of the Fourth Amendment protection against unreasonable warrantless search and seizure, provided by the Fourth Amendment to the Constitution of the United States.	
2. The Court should grant certiorari to consider whether the application of the Florida sentencing statute by the trial court and its affirmation by the Florida Supreme Court violated the Eighth and Fourteenth Amendments of the Constitution of the United States.	
Conclusion	25
Appendix A Opinion of the Supreme Court of Florida	A-1

CASES CITED

	Pages
Fixel v. Wainwright, 492 Fed. 2nd 480 (5 Cir. 1974,.....	18, 19
Foster v. State, 369 So. 2nd 928 (Fl. 1976).....	14, 23
Furman v. Georgia, 408 U. S. 238, 33 L. Ed. 2nd 346..... (1974).....	23
Gafford v. State, 387 So. 2nd 333 (Fl. 1980).....	15
Gardner v. Florida, 430 U.S. 349, 51 L. Ed. 2nd 393..... (1980)	15, 22
Godfrey v. Georgia, 446 U.S. 420 (1980), 64 L. Ed. 2nd 398, 100 S. Ct. 1759.....	16, 22
Gregg v. Georgia, 428 U. S. 153 (1976), 49 L. Ed. 2nd 859, 96 S. Ct. 2909	16, 22, 24, 25
Hester v. United States, 265 U. S. 57, 44 S. Ct. 445 68 L. Ed. 898 (1924).....	21
Katz v. U. S., 389 U.S. 347, 88 S. Ct. 507 19 L. Ed. 2nd 576 (1967).....	12, 20
Lopez v U.S. 373 U.S. 427, 10 L. Ed. 2nd 462, 470.....	20
Morsman v State of Florida, 394 So. 2nd 408 (1981) Cert. denied 101 S. Ct. 3066 (1981).....	17, 18
Odom v. State, 403 So. 2nd 936 (1981)	9, 10, 17
Proffitt v. State of Florida, 428 U. S. 242, 96 S. Ct. 2960 49 L. Ed. 2nd 913 (1976)	16, 23, 24
Provence v State, 337 So. 2nd 783 (Fl. 1976).....	14, 24
Silverman v United States, 365 U. S. 505 5 L. Ed. 2d 734 81 S. Ct. 679 (1961).....	20
Smith v Maryland, 442 U. S. 735, 99 S. Ct. 2577.....	20
State of Florida v. Brady, 407 So. 2nd 1093 (1981)....	21
State v. Sarmiento, 397 So. 2nd 643 (Fl. 1981)	9, 17
State Statute: Florida Statute 921.141 (5)	8, 9
U. S. Constitution, Amendment IV	2
Amendment VIII	2
Amendment XIV	2

No. 83 -

IN THE

SUPREME COURT OF THE UNITED STATES

January Term, 1983

JAMES DOUGLAS HILL,

Petitioner,

v.

STATE OF FLORIDA

Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

Petitioner, James Douglas Hill respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Florida is reported at _____Fla. ____. (___So. (1982) and is attached hereto as Appendix.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on July 15, 1982. A timely petition for rehearing was denied on October 5, 1982. An Order was made by Mr. Justice Powell on December 3, 1982 extending the time of the Petitioner to file a Petition for Certiorari to and including January 3, 1983. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Sec. 1257(3), Petitioner having asserted below and asserting herein deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States, which provides in relevant part:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;"

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On the afternoon of June 22, 1980, Rosa Lee Parker, age 12, went skating with Tina Deal, Tammy Deal, Russell Jackson, and the Petitioner(R 269). Rosa Lee Parker was wearing shorts and a blue shirt (R 267). After skating for approximately three hours, they all returned around 4:30 p.m. to the home of Tina and Tammy Deal (R 270). The Petitioner, whose motorcycle was at the Deal home, left shortly thereafter on the motorcycle along with Russell Jackson and returned minutes later alone (R 273). The Petitioner then proceeded to give Tina Deal, Tammy Deal, and Rosa Lee Parker short rides around the neighborhood on his motorcycle (R 274).

Thereafter, at approximately 5:00 p.m., Petitioner left on his motorcycle with Tina Deal and travelled to the home of Daniel Munson (R 274). He then travelled to his home, obtained a can of coffee, and then returned with Tina Deal to her home around 7:00 p.m. (R 275, 276).

Petitioner stayed at the Deal home for approximately another hour and then left on his motorcycle around 8:00 p.m. (R 277).

Rosa Lee Parker, who was still at the Deal home, then asked Tammy Deal to walk to a nearby schoolyard with her to play. Tammy Deal's mother would not permit this, and Rosa Lee Parker then left the Deal home at approximately 8:30 p.m. headed toward the schoolyard alone (R 302).

Daniel Munson testified that sometime around 9:00 p.m. on June 22, 1980, Petitioner came to his home on his motorcycle

with an unknown female passenger (R 348). The passenger was wearing long pants and a long-sleeved shirt (R 411). Since Daniel Munson would not let the Petitioner into his home, the Petitioner and his passenger left (R 350).

Munson testified that Petitioner again returned to his home later that same evening, around midnight or during the early morning hours of June 23, 1980, (R 351) and asked if Munson wanted to see a dead body (R 365).

The Petitioner, according to Munson, then took Munson to an uninhabited area nearby known as the "Pits" and showed Munson a dead body (R 365).

Gary Hill and Arnel Perkins testified that around 10:30 p.m. on June 22, 1980, they were sitting on the front porch of Gary Hill's home when they saw Daniel Munson come from the "Pits" area. Munson was in a hurry and he was carrying his shirt in his hand. When this occurred they both testified that the Petitioner was inside the Hill home, asleep on the floor (R 546).

During the late morning or early afternoon of Monday, June 23, 1980, Daniel Munson took Gary Hill and Russell Jackson to the "Pits" area and showed them the dead body which was identified as Rosa Lee Parker (R 556). This was initiated by Daniel Munson and no mention was made of the Petitioner at this time. While in the vicinity of the dead body, Munson picked up sunglasses and was going to keep them (R 557). Munson's testimony differed in that he stated that he concealed the sunglesses and only showed them to Gary Hill and Russell Jackson when he returned to his home, stating that he thought they belonged to the

Petitioner (R 371, 403).

During the evening of Tuesday, June 24, 1980, Munson again travelled to the "Pits" area and viewed the body with the Petitioner (R 375).

On Wednesday, June 25, 1980, Russell Jackson's father reported information to authorities regarding the dead body and the body was found and retrieved by authorities on June 25, 1980 (R 333). The body was found in a shallow grave of mud and hyacinths and it was partially exposed (R 448).

An autopsy was performed and the cause of death was found to be mechanical asphyxiation (R 321).

Daniel Munson was questioned regarding the death by reason of the fact that his name was mentioned by Russell Jackson. Munson eventually agreed to make a statement implicating the Petitioner in the crime.

On July 2, 1980, the Hillsborough County Sheriff's Office persuaded Munson to go to the home of the Petitioner, the prime suspect and target, to elicit statements from him regarding the death of Rosa Lee Parker. Certain promises were made to Munson regarding pending criminal charges in exchange for his cooperation. Specifically, he was promised that the State would drop a pending burglary charge, that the State would take care of any pending parole violations, and that he would not be charged as an accessory to the crime of murder involving Rosa Lee Parker (R 377).

An electronic transmitter was concealed on the person of Daniel Munson and he was directed to go to the home of the

Petitioner and attempt to draw him outside and talk to him. Officers were staioned nearby in two mobile vans with electronic receivers and recorders (R 378).

Munson travelled to Petitioner's home and, after talking with Petitioner inside his house, persuaded the Petitioner to walk out into the fenced backyard of the Petitioner's home to talk privately (R 490, 500, 860, 861). The conversation between Petitioner and Daniel Munson was recorded and the tape recording along with the testimony of Munson and the officers who operated the receivers and made the recordings were used at trial over Petitioner's objections.

It is agreed that none of the investigating officers involved obtained any intercept warrant pursuant to Florida Statute (934) prior to the electronic recordings obtained on July 1, 1980, or that there existed such emergency circumstances that would negate the necessity of obtaining such an intercept warrant (R827).

A Motion to suppress the tape recording, its transcript and the testimony of the officers regarding conversations between Petitioner and Daniel Munson occurring on July 1, 1980, overheard by means of electronic devices was made prior to trial. It was timely asserted that the electronic interception was obtained in violation of Petitioner's right to privacy against electronic intrusion guaranteed by the Constitution of the United States (R 12, 13).

The Trial Court denied the motion. It was of the view that the guaranteed right of privacy from electronic intrusion did not extend to the subject enclosed backyard, but was restricted

to the four walls of Petitioner's home (R 861, 863).

The Trial Court in denying the suppression motion found a difference to support its denial in the reasonable expectation of privacy in the backyard.

> "If you are inside the house it is [referring to the expectation of privacy] but if you are out in the backyard it is not" [expectation of privacy] (R 863).

and at R 872:

> "I do not think there is a reasonable expectation of privacy in the back yard."

The Assistant Attorney General in his summation to the jury conceded "that promises were made to Danny Munson" who was the informant, and that "Danny Munson, Russell Jackson, held the keys to this case." (R 585), and at R 586: "One of the most important pieces of evidence in this case besides all the other testimony that you heard that really brings everything together is the body bug that was put on Danny Munson."

The Attorney General graphically described Munson, the informant:

> "He is a criminal. He wants to stay out of prison. He's been there before." (R 610).

The critical significance of the tape in this case was emphasized by the prosecutor in summation to the jury (R 625).

> "Ladies and gentlemen, you can disbelieve everybody in this trial, but you cannot dispute the language on this tape because it comes from Hill's own mouth. That does not leave any doubt in your mind."

The critical part that the tape played in the jury's

deliberation was graphically shown when after retiring, the jury returned with a question:

> THE COURT: Ladies and gentlemen of the jury. I understand you have a question.
>
> JUROR #9: Yes, sir, Your Honor. We request that we would like to listen to the tape again, please, in its entirety, without any interruptions."
>
> (The tape was played)

The jury then retired again at 12:55 p.m. and returned to the courtroom at 2 p.m. with its guilty verdict of first degree murder.

The dissenting opinion in the Court below in finding reversible error in the introduction of the tapes of conversation between Munson and Hill stressed its importance in the trial.

> "We cannot say that the admission of the tape here was harmless. It played a significant role in the trial and was frequently discussed by witnesses and the prosecutor. Information gained from it was used in rebuttal." (See Appendix)

Upon the return by the jury of the guilty verdict, the sentencing procedure prescribed by Florida statute in first degree murder cases was undertaken by the Court. (F.S. 921.141)

The Trial Judge read to the jury then functioning in an advistory capacity the statutory enumerated aggravating and mitigating factors to be considered by them in reaching their recommendation on either life or death sentences (R 703). The Trial Court furnished no explanation in lay language of the meaning of the various technical terms used by the statute. The jury after its deliberation recommended to the Court the imposition of the death penalty (R 709) and the Court immediately stated that it concurred in the jury's recommendation.

The Court thereafter made its formal required findings in entering the judgment and sentence.

Subdivision H of the statute prescribes as one of the aggravating factors to be considered, the following:

> "the capital felony was especially heinous, atrocious or cruel."

Subdivision I of the statute, enumerating a different and other aggravating factor to be considered is as follows:

> "The capital felony was homicide and was committed in a cold calculated, and premeditated manner without any pretense or moral or legal justification."

The Trial Court then stated in its findings:

"H and I will be considered together." (R 64).

The Court then proceeded to discuss together the same testimony to support both of the above aggravating factors.

The Court found one mitigating circumstance; no history of prior criminal activity on the part of the Petitioner, and having employed the above method of reaching two aggravating factors, found that the aggravating factors outweighed the mitigating circumstances and imposed the death sentence.

The Florida Supreme Court rejected both constitutional claims of Petitioner, holding that:

> "the instant tape recording was of a conversation which occurred in appellant's backyard, not in the home."

It refused to extend its holding in State vs. Sarmiento, 397 So. 2nd 643 (Fla. 1981) where it held that a tape recording of a conversation in a home was an unconstitutional intrusion. It also refused to accept its similar holding on Odom v. State,

403 So. 2nd 936 (Fla. 1981) "because that interception was in the home."

And although the Florida Supreme Court found that

> "the trial court considered both aggravating factors together"

[referring to the sentencing procedure] it nevertheless found that the applicable statute was applied properly by the sentencing Judge.

See Appendix)

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW.

THE TAPES

Prior to the trial, the Petitioner filed a Motion, dated October 13, 1980, seeking to suppress the tape recordings of the conversation of July 1, 1980 between the Petitioner and Danny Munson, and any transcript of said tape recording and any testimony by the police concerning the conversation between the Petitioner and Munson on that date, such conversation heard by the use of electronic transmission device placed on Munson and received by an electronic receiver (R 12). Said Motion asserted that:

> "such tape recording was obtained in violation of Petitioner's right to ... privacy as guaranteed by the ... United States Constitution and the Constitution of the State of Florida."

It further argued that the transcript of the tape recording was likewise obtained "in violation of the Petitioner's right to privacy guaranteed by the above named provisions of the United States Constitution and the Constitution of the State of Florida," and that any testimony by the officers regarding conversation likewise would be in violation of Petitioner's rights

guaranteed by the United States Constitution (R 13).

A hearing on the suppression motion was conducted by the Trial Court. The constitutional question was again raised by the Petitioner (R 860).

> "MR. YOUNG: Yes. And search in the backyard. The backyard here is a fenced yard. It's away from the street. It's clothed with the same expectation of privacy. The fellow, Munson, came to Hill's house. They walk into the house. Munson engages in conversation. They go out in the backyard. He said, 'Let's go out in the backyard.' Hill follows him to the backyard. To me, I don't see how that makes any difference being either in the house or right on the back porch or in the backyard. The whole issue is the expectation of privacy. There is a constitutional expectation of privacy."

The Court was of the view that the reasonable expectation of privacy in a fenced backyard was not the same as in a home because a neighbor might be "on the other side of the fence eavesdropping", and then continued and stated:

> "Maybe I am wrong in light of what you just said, but I think there is a difference in the reasonable expectation of privacy." (R 861).

The Court, troubled by the question raised by the Petitioner finally posed the question which remained unanswered.

> "THE COURT: My question is: Has the United States Supreme Court said, apparently they -- has the United States Supreme Court said you can go into a private home with the police officer or agent of the police and bug that person, transcribe and send out of the home over a recording device a conversation? They haven't addressed that? What does Katz talk about?" R 869

Nevertheless, the Court denied the Motion to Suppress (R 872).

The Petitioner in his brief to the Court below raised the constitutional question presented to this Court as follows:

"In conclusion, this Court has before it an opportunity to unequivocally state that the rights of citizens of the State of Florida against self-incrimination and against unlawful search and seizure by means of electronic eavesdropping will not be abridged when the circumstances are such that an individual has a reasonable expectation of privacy when having a conversation with a third party and this conversation takes place within an area reasonably protected by the Constitution of the State of Florida as well as the United States Constitution." (P. 6, Reply brief of Petitioner).

Petitioner in his brief below pointed out that there was no evidence at the trial to show that there was not sufficient time for the Sheriff or the State to obtain the warrant authorizing the interception of the conversation. (p. 9).

Petitioner in the same brief noted too that there was "no testimony that the conversations could be overheard by anyone other than the participants, both while they were in the home of the Appellant and in the back yard of the Appellant, without the use of electronic transmitting and receiving devices." (p. 11)

Finally, Petitioner urged the Court below that "It is the Appellant's contention that he had the same reasonable expectation of privacy in his back yard as well as within the home based upon the facts of this case." (p. 13).

Both the trial Court and the Court below rejected the constitutional issue raised by Petitioner.

THE SENTENCING PROCEDURE

The Petitioner in the Court below raised the unconstitutional application of the Florida sentencing statute (F. S. Sec. 921.14) (pp. 18, 19). Petitioner again raised it in his reply brief to the Court below at page 7.

Petitioner argued before the Court below that in applying the sentencing statute the trial judge considered these two aggravating circumstances together and based his decision upon the same evidence and testimony for both circumstances. Since it is well settled that aggravating circumstances in a murder prosecution must be proven beyond a reasonable doubt, Foster v. State, 369 So. 2nd 928 (Fla. 1979), it is incumbent upon the trial Judge to make a distinction in the evidence and testimony as it applies to each particular aggravating circumstance or otherwise the purpose of denoting separate and distinct aggravating circumstances in the Statute is a nullity.

It would appear from the trial Judge's written findings as to aggravating and mitigating circumstances (R 61 - R 78) that he failed to delineate specific evidence to support each particular circumstance which had the effect of creating two aggravating circumstances out of the same evidence where only one, if any, would exist. This is essential in this cause, due to the fact that only two aggravating circumstances were found to exist and one mitigating circumstance was found to exist.

It is well settled that a trial Judge cannot double up on aggravating circumstances. Provence v. State, 337 So. 2nd

783 (Fla. 1976). See also Gafford v. State, 387 So. 2nd 333 (Fla. 1980).

One of the Justices of the Court below dissented from the imposition of the death sentence, disagreeing that either of these elements (the aggravating circumstances) was proven beyond a reasonable doubt.

In Gardner this Court in vacating the death sentence imposed by the trial Judge after the jury had recommended a life sentence reminded us "that any decision to impose the death sentence be based on reason rather than caprice and emotion." (P. 358 of 430 U.S. and P. 402 of 51 L. Ed. 2nd).

This case presents to this Court a cursory and rubber-stamp review by the Florida Supreme Court. Such review the Petitioner urges this Court to consider does not satisfy the hopes and expectations expressed in Proffitt and the promise made by Florida in its statute.

It is suggested by the Petitioner that the device used by the trial Judge of arbitrarily combining aggravating factors and then counting them as two factors is unconstitutional, offensive as the trial Judge's use of a confidential report in Gardner. This Court should consider whether the denial of due process occurred in this case as it did in Gardner.

This Court too should consider whether the sentencing procedure invoked by the trial Court and approved by the Court below created the very situation sought to be obviated in Gregg; when the death penalty should not be inflicted in an arbitrary and

capricious manner.

By the granting of this Petition, this Court could furnish guidance to Florida as to whether the sentencing technique used in this case is constitutionally impermissible.

Justice Marshall, in Godfrey summarizes the numerous cases where death sentences were imposed, and this Court after granting certiorari to consider the sentencing procedures were vacated because they were found to be fraught with Eighth or Fourteenth Amendment defects. (See p. 413 of 64 Fed. 2nd, p. 439 of 446 U. S.)

The Court by granting this Petition would then be able to consider whether this is not yet another case of non-compliance with this Court's strictures and hopes expressed in Gregg and the failure of Florida to meet the standards set forth in this Statute and approved in Proffitt.

REASONS FOR GRANTING THE WRIT:

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE DENIAL OF THE MOTION TO SUPPRESS TO PRECLUDE THE ADMISSIBILITY OF THE ELECTRONIC TAPES WAS A VIOLATION OF THE FOURTH AMENDMENT PROTECTION AGAINST UNREASONABLE WARRANTLESS SEARCH AND SEIZURE, PROVIDED BY THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The Trial Judge, in denying the Motion to Suppress was of the mistaken view that it was the "place" that gave rise to the Fourth Amendment protection, rather than the expectation of privacy and the reasonableness of such expectation. The Trial Judge, as stated previously, question (R 869) whether this Court ever considered the setting in this case, and whether Katz was instructive or helpful, referring, of course to Katz v. U. S., 389 U. S. 347, 88 Supreme Court, 507 (L. ed. 2nd 576), (1967).

Again, the Court below in affirming the conviction and the death sentence predicated, as we have shown in this Petition, primarily on the tape, when faced with the question whether the right of privacy could extend to the subject enclosed fenced back-yard, refused to extend its ruling in Sarmiento v. State, 397 So. 2nd 643 (1981) and Odom v. State, 403 So. 2nd 936 (1981) beyond protecting the four walls of the home against warrantless intrusion by electronic interception to a backyard. (See Appendix)

At the Suppression hearing, petitioner's trial counsel urged upon the Trial Court, Morsman v. State of Florida, 394 So. 2nd 408 (1981) where the Court below suppressed marijuana taken by the police from unfenced backyard without warrant.

At page 409:

> "However, the backyard of a residence is more private because passerby cannot generally view this area. In Fixel v. Wainwright, 492 F. 2d 480 (5th Cir. 1974) this concept was extended to the backyard of a four-unit apartment building. Although not as exclusive as the backyard of a private residence, the backyard was not a common passageway normally used by tenants or businessmen who might approach the tenants. Accord, Olivera v. State, 315 So. 2d 487, 490 (Fla. 2d DCA 1975.)"

And continuing on the same page, the Court below held:

> "When there is no legal right to observe an article of contraband, it is illegal to seize the article. Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967).

Even though the seizure was from an open area, the Court concluded in Morsman, at page 410: (101 Sup. Ct. 3066)

> "The shortcut taken by skipping the application for a warrant was unjustified and violated Defendant's Fourth Amendment right to be free from an unreasonable search and seizure."

The State of Florida, feeling aggrieved at the result in Morsman, filed a Petition for Certiorari in this Court, but it was denied in June, 1981.

The Court below, in affirming Morsman, cited Fixel v. Wainwright, 492 Fed. 2nd 480 (5th Cir. 1974). In Fixel the Court below had affirmed the conviction, and a petition for a writ of habeas corpus was dismissed by the District Court. On appeal, the Circuit Court reversed. The issue was whether the seizure in the back-yard was offensive to Fourth Amendment protection.

In Fixel the Court cited various Circuit Court holdings that the backyard of a house was a constitutionally protected area.

"The Fourth Amendment's protection, however, extends further than just the walls of the physical structure of the home itself. The area immediately surrounding and closely related to the dwelling is also entitled to the Fourth Amendment's protection. In defining the surrounding area entitled to such protection, the courts historically have found helpful the common law concept of curtilage, meaning 'yard, courtyard or other piece of ground included within the fence surrounding a dwelling house.' Marullo v. United States, 328 F. 2d 361, 363 (5th Cir. 1964) QUOTING Webster's Third New International Dictionary (1962). SEE United States v. Molkenbur, 430 F. 2d 563, 566 (8th Cir. 1970); United States v. Davis, 423 F. 2d 974, 977-978 (5th Cir. 1970); United States ex rel. Boyance v. Myers, 398 F. 2d 896, 899 (3rd Cir. 1968); United States v. Mullin, 329 F 2d 295, 298 (4th Cir. 1964). When officers have physically invaded this protected area, either to seize evidence or to obtain a view of legal activities, we have readily condemned such an invasion as violative of the Fourth Amendment. United States v. Davis, supra, 423 F. 2d at 977; Texas v. Gonzales, 388 F.2d 145, 147-148 (5th Cir. 1968); Brock v. United States, 223 F.2d 681, 685 (5th Cir. 1955); SEE Gil v. Beto, 440 F. 2d 666, 667 (5th Cir. 1971)." (See p. 483)

But none of the cases summarized by the Court in Fixel reached the question posed by this Petition, -- did the warrantless electronic intrusion of private conversation in Petitioner's enclosed back yard in the setting described, constitute a violation of the Fourth Amendment rights?

At the trial it appeared that the informant, Munson, drew Petitioner from his family group present within his home, to his enclosed backyard for such private conversations with the Petitioner as informant was instructed by the police. (R 417). Petitioner urged below, and urges again that Petitioner exhibited an expectation of privacy in an area that society is prepared to recognize as reasonable.

Petitioner has met the requisite test and standards enabling him to such protection, as set forth in Smith v. Maryland, 442 U. S. 735, 99 S. Ct. 2577, and in Katz v. United States, supra.

This Court while permitting electronic intrusion in an unprotected area has "insisted only that the electronic device not be planted by an unlawful physical invasion of a constitutionally protected area." Lopez v. United States, 373 U. S. 427, 10 L. ed. 2nd. 462, 470.

Lopez refers us to Silverman v. United States, 365 US 505, 5 L ed 2d 734, 81 S Ct 679 (1961) where this Court held electronic intrusion a deprivation of Fourth Amendment rights. In that case there was an electronic intrusion of petitioner's conversations in his home and office.

Justice Harlan, in his concurring opinion in Katz, supra, confirmed the holding in Silverman when he stated that Silverman instructs us:

> "that eavesdropping accomplished by means of an electronic device that penetrated the premises occupied by petitioner was a violation of the Fourth Amendment. That case established the interception of conversations reasonably intended to be private could constitute a 'search and seizure,' and that the examination or taking of physical property was not required."

(at page 588 of L. ed. 2nd)

We find our case no different than Silverman, discussed by Justice Harlan, except that our Petitioner's private conversation occurred in his enclosed backyard, which were electronically intercepted by the police.

Curiously, the Court below, while perceiving that Petitioner's Fourth Amendment rights do not apply to electronic

interception outside the four walls of his home, has no difficulty in applying the Fourth Amendment to an open area when warrantless physical seizure occurs. (see e.g. State of Florida v. Brady, 407 So. 2nd 1093 (1981). The Court below in Brady had no difficulty when it came to physical seizure to find that the "open field" doctrine announced by this Court in Hester v. United States, 265 U.S. 57, 44 S. Ct. 445, 68 L. ed. 898 (1924) did not apply.

But unless this Court grants the Petition for Certiorari on this significant constitutional question, the Court below will have snuffed out Petitioner's Fourth Amendment rights as well as his life.

THE DEATH SENTENCE

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE APPLICATION OF THE FLORIDA SENTENCING STATUTE BY THE TRIAL COURT AND ITS AFFIRMATION BY THE FLORIDA SUPREME COURT VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES.

As this Court has repeatedly declared, both the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment require that the decision to impose a sentence of death must be a reasoned and rational determination. In Gregg v. Georgia, 428 U. S. 153 (1976), the Court upheld Georgia's death penalty statute against Eighth Amendment challenge in part because of the express statutory mandate that the state supreme court review every death sentence to determine whether it "was imposed under the influence of passion, prejudice, or any other arbitrary factors." Ga. Code Ann. Sec. 27-2537 (c) (1); see Gregg v. Georgia, supra, 428 U. S. at 198. In Gardner v. Florida, 430 U. S. 349, 358 (1977), the Court stressed that:

> "It is of vital importance to the defendant and the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."

The Court reiterated this principle in Godfrey v. Georgia, 446 U. S. 420 (1980), in which the Court reversed a death sentence which could not be said to be "based on reason rather than caprice or emotion." In earlier capital cases, the Court similarly paid careful heed to the constitutional concern that the decision to extinguish the life of an individual must not be the product of passion or emotion.

This Petition presents to the Court the opportunity to consider whether even where the underlying statute has been found on its face to meet the constitutional standards now set out by this Court (Proffitt v. State of Florida, 428 U. S. 242, 49 L. Ed. 2d 913, 96 Sup. Ct. 2960 (1976) yet, its application may face the same fatal difficulties found to be present in Furman v. Georgia, 408 U.S. 238, 33 L. Ed. 2d 346 (1974).

The Florida statute, which this Court in Proffitt, supra found to pass constitutional muster contains separate and specific aggravating and mitigating factors, each to be considered separately by the sentencing Judge. The proof as to each factor must be separate and distinct and proven beyond a reasonable doubt. (Foster v. State, 369 So. 2nd 938 (Fla. 1979).

The Florida Legislature in enacting the statute to meet the standards prescribed in Furman, supra, wanted to be certain that the individual aggravating circumstances would outweigh the mitigating circumstances in order to justify the imposition of the death penalty.

Instead, the sentencing Judge in this case combined two of the aggravating factors described by the statute (H and I) and then used the same evidence to support both factors. He then concluded that the two statutory aggravating factors outweighed the one mitigating factor (no prior criminal history) and imposed the death sentence. The Court exercised its discretion,

unauthorized by the statute, and perceived that it had responsibly and constitutionally discharged its sentencing function.

The lower Court approved the method in which the trial Judge applied the statute. When the Court below was presented with the issue as to whether the trial court erred in improperly doubling the aggravating circumstances, it should have rejected such a vague and dubious application of the death sentence. Especially is this so in light of the decision in cases such as Provence v. State, supra, where the Court below vacated a death sentence imposed by the sentencing Judge and stated: (at p 786)

> "But Section 921.141, Florida Statutes, intended as it was to meet the constitutional infirmity of capital sentencing procedures explored in Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) is designed to limit the unbridled exercise of judicial discretion in cases where the ultimate penalty is possible."

The lower Court's ambiguous construction of the relevant provisions of the statute opens the door to undue discretion to the trial court and creates intolerable unconstitutional dangers and arbitrariness and caprice.

In Gregg, supra, this Court expected that the statutes enacted by the various states would eliminate the very risk and danger here present, and when this Court approved the Florida statute in Proffitt, supra, it expected that the application of the statute would meet the test and be applied

in a precise and evenhanded manner.

Yet this advisory jury's function was performed by instructions given to it in the form of the bare words of the statute, words that could be understood to apply to any murder. Then the sentencing Judge used the statute as he saw fit in an unbridled manner, combining aggravating factors since these could not be sustained on an independent and separate basis. The trial Judge did that in order to corroborate and confirm his comments to the advisory jury immediately upon its return with their recommendation of the death penalty (R 709):

> "The Court fully concurs in the verdict of guilty and fully concurs in the jury's recommendation of death." (R 10).

This concurrence was even before the sentencing Judge reviewed the record, reflected upon the evidence and applied the statute.

The question presented by this Petition is -- did the Court below apply the Florida statute in an arbitrary and capricious manner so that the imposition of the death penalty to this Petitioner is an invasion of his Eighth and Fourteenth Amendment rights.

Even if the objective goal of Gregg is satisfied by the Florida statute, yet this Court ought to consider whether there is here present yet another illustration where the sentencing procedure allows unbridled discretion.

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should be granted.

Respectfully submitted,

BARNEY ROSENSTEIN
Attorney for Petitioner
2431 Riverbluff Parkway
Sarasota, FL 33581

... APPENDIX ...

SUPREME COURT OF FLORIDA

No. 60,144

JAMES DOUGLAS HILL, Appellant

v.

STATE OF FLORIDA, Appellee.

(July 15, 1982)

PER CURIAM

This is a direct appeal from appellant's conviction of first-degree murder and, in accordance with the jury's recommendation, a sentence of death. See art. V, Sec. 3(b)(1), Fla. Const. We affirm, holding that the dictates of Sarmiento v. State, 397 So. 2d 643 (Fla. 1981), do not preclude the admission into evidence of appellant's confession made to an informant in appellant's backyard and recorded by police with electronic surveillance equipment.

The facts show that on June 25, 1980, authorities retrieved the dead body of twelve-year-old Rosa Lee Parker from an area known as the "Pits" in Hillsborough County. The body lay partially exposed in a shallow grave, covered with mud and hyacinths, and was clothed only in a brassiere pulled up over the breasts. The medical examiner determined the cause of death to be mechanical asphyxiation. The state charged twenty-two-year old appellant with

first-degree murder.

The testimony at trial revealed that on the afternoon of June 23, the victim, appellant, young Tina and Tammy Deal, and Russell Jackson went skating. Afterwards, they returned to the Deals' home. Later in the evening, Rosa Lee asked Tammy Deal to accompany her to a nearby schoolyard to play, but Tammy's mother would not permit it. Rosa Lee then left alone, headed toward the school. This was the last time anyone saw Rosa Lee alive.

Russell Jackson testified that on the same evening appellant asked him if he wanted to help rape Rosa Lee, and, if he did, appellant would take her somewhere afterwards and "get rid of her." Another of appellant's friends, Daniel Munson, testified that, early in the evening of the murder, appellant came to his house on his motorcycle, accompanied by a female whom Munson could not identify. Munson would not let appellant enter his home, and appellant and the female departed. Munson further testified that appellant returned to his home alone about midnight, said that "he had the nerve to hurt someone," and took Munson to see Rosa Lee Parker's dead body. While viewing the body, appellant boasted, "She wouldn't give it up, so I had to take it."

In the initial investigation, Munson related this information to the police. They persuaded him to go to appellant's home wired with electronic surveillance equipment for the purpose of eliciting incriminating statements from appellant. Munson agreed to do so after authorities promised to drop a pending burglary charge against him, drop pending

parole violation charges, and not to charge him with accessory after the fact for the instant murder. Munson went to appellant's home, persuaded appellant to accompany him into the backyard, and there obtained statements in which appellant admitted committing the murder. Munson testified concerning those statements at trial and the state introduced, over objection, both the police recording of the conversation and the testimony of the officers who overhead the conversation by way of the surveillance equipment.

The jury recommended death and the trial judge imposed a death sentence. The court found two aggravating factors, (1) that the murder was heinous, atrocious, and cruel, and (2) that it was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, and one mitigating factor, that appellant had no significant criminal history.

Trial Phase

Appellant raises three points dealing with the trial phase: (1) The tape recording and the officers' testimony of appellant's statements were obtained in violation of this Court's decision in State v. Sarmiento, 397 So. 2d 643 (Fla. 1981); (2) because Munson was acting pursuant to police instructions, he was an arm of the police department, and the statements he obtained were a violation of Miranda v. Arizona, 384 U. S. 436 (1966); and (3) There was not sufficient evidence as a matter of law to prove premeditation.

Appellant first argues that the trial court committed reversible error in not suppressing the officers' testimony and the tape-recorded conversation between Munson and appellant. In State v. Sarmiento, we held that "the warrantless, electronic interception by agents of a conversation between defendant and an undercover police officer in defendant's home [was] an unreasonable interception of defendant's private communications in violation of article I, Section 12, Florida Constitution." 397 So. 2d at 644. We based our decision on the principle that one enjoys a reasonable expectation of privacy in one's own home and that it is unreasonable to expect that others not privy to an in-home conversation will be listening in through electronic surveilling equipment. We concluded in Sarmiento that the tape recording and the testimony of officers listening to the surveilling devices were not admissible against the homeowner.

The instant case is, however, distinguishable from Sarmiento because the instant tape recording was of a conversation which occurred in appellant's backyard, not in the home. We refuse to extend the reasoning in Sarmiento and the protections of article I, section 12, beyond the four walls of the home. We note Odom v. State, 403 So. 2d 936 (Fla. 1981), is also distinguishable from our holding in the instant case because that interception was in the home.

Because of mischaracterizations of our opinion in Sarmiento, we also feel that it is necessary to emphasize two points. First, Sarmiento does not prohibit an undercover officer

or any other person who is privy to an in-home conversation from testifying about statements made therein. Second, the opinion does not prohibit the use of electronic surveilling devices by undercover officers in the home as long as a warrant has issued by an appropriate judicial officer.

Appellant's second contention is that, because Munson was acting under police instruction, appellant's statement made to Munson must be suppressed because the dictates of Miranda v. Arizona were not satisfied. This argument is without merit. Miranda only applies in instances of custodial interrogation; appellant was not in custody, nor was his freedom of movement restricted in any manner. See United States v. White, 401 U. S. 745 (1971); Hoffa v. United States, 385 U. S. 293 (1966).

In a third point, appellant argues that there was insufficient evidence, as a matter of law, to prove premeditation. At appellant's trial, the state proved premeditation through the testimony of two witnesses. Russell Jackson testified that appellant asked him to come and help rape the victim and that, if he did, appellant would later "get rid of her." Munson testified that appellant told him why he raped and murdered the victim: "She wouldn't give it up so I had to take it." We are satisfied that the evidence presented at trial is sufficient to support appellant's guilt of first-degree premeditated murder beyond a reasonable doubt. Phippen v. State, 389 So. 2d 991 (Fla. 1980); Spinkellink v. State, 313 So. 2d 666 (Fla. 1975).

Sentencing Phase

Appellant contends that the trial court, in the penalty phase, improperly doubled up aggravating circumstances, making the death penalty inappropriate. The trial court found two aggravating factors: The murder was heinous, atrocious, and cruel, and the murder was committed in a cold, calculated, and premeditated fashion without any pretense of legal or moral justification. Appellant asserts that the trial court based its findings as to both factors on the same evidence and did not distinguish the two. This, appellant claims, was improper. We find that, although the trial court considered both aggravating factors together, the trial court's findings contained distinct proof as to each factor. The record shows that appellant committed the rape and murder in such a fashion as to make it especially heinous, atrocious, and cruel. Further, the record shows that appellant's state of mind was such that he intended to rape and then murder the victim and that he made this decision substantially before the time that he picked her up. We conclude that this supports the finding that the murder was committed in a cold and calculated manner without prtense of moral or legal justification. The sentence of death was proper. See Buford v. State, 403 So. 2d 943 (Fla. 1981); LeDuc v. State, 365 So. 2d 149 (Fla. 1978), cert. denied, 444 U. S. 885 (1979); Hoy v. State, 353 So. 2d 826 (Fla. 1977), cert. denied, 439 U. S. 920 (1978).

Accordingly, finding no reversible error, appellant's conviction and sentence of death are affirmed.

It is so ordered.

ALDERMAN, C.J., ADKINS, BOYD, OVERTON and EHRLICH, JJ., Concur
McDONALD, J., Dissents with an opinion in which SUNDBERG, J., Concurs as to part I only.
SUNDBERG, J., Dissents

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

--

McDONALD, J., dissenting

I.

It was reversible error to allow the introduction of the tapes of conversation between Munson and Hill. A comparable factual circumstance existed in Odom v. State, 403 So. 2d 936 (Fla. 1981). There, one Gerald Jones, in cooperation with the police, wore a hidden transmitter and engaged Odom in a conversation in his home in which he made incriminating statements which the police recorded. We held that the admission of the tape into evidence was error under the constitutional rule excluding evidence obtained in violation of article I, section 12 of the Florida Constitution. When Munson agreed to elicit information from Hill in consideration for the state's dismissing charges against him, he became an agent of the state. He allowed a body bug to be planted on him and surreptitiously recorded the private conversation during which he caused Hill to discuss the homicide. This was an unreasonable interception of a private conversation and as such was proscribed by article I, section 12 of the Florida Constitution.

Had Hill been indicted at the time the conversations took place, all evidence of the conversation would be excluded because there would have been a sixth amendment violation. Massiah v. United States, 377 U. S. 201 (1964). See also United States v. Henry, 100 S. Ct. 1083 (1980). While that factor does not exist here, and we are not considering a sixth amendment violation, the language of Massiah and Henry suggests that courts should look with a critical eye at statements deliberately elicited by prosecutorial authority. See Malone v. State, 190 So. 2d

338 (Fla. 1980). Because of that fact I would be inclined to raise the entire conversation to a violation of article I, section 12, but I will resist that temptation and restrict the application to the unreasonable interception.

In Odom we held the error harmless because the tape was merely cumulative. We can't say that the admission of the tape here was harmless. It played a significant role in the trial and was frequently discussed by witnesses and the prosecutor. Information gained from it was used in rebuttal.

This case should be remanded for a new trial.

II.

I also dissent from the imposition of the death penalty in this case. That sentence was predicated upon a finding that the crime was heinous, atrocious, and cruel and that the murder was committed in a cold, calculated, and premeditated fashion without any pretense of legal or moral justification. I disagree that either of these elements was proved beyond a reasonable doubt. I will concede that an inference of each exists, but aggravating factors must be proved beyond a reasonable doubt and that proof is not met here. Since there is one mitigating factor and the proof of aggravation is insufficient, only a life sentence should be imposed should this conviction stand.

SUNDBERG, J., Concurs as to part I only.

IN THE

SUPREME COURT OF THE UNITED STATES

Office-Supreme Court, U.S.
FILED
FEB 7 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-5977

JAMES DOUGLAS HILL,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE
SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

JIM SMITH
ATTORNEY GENERAL

THEDA JAMES DAVIS
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

Counsel for Respondent

INDEX

PAGE

Opinion below 1
Jurisdiction 1
Questions presented 2
Constitutional and statutory provisions involved 2
Statement of the case 3
Reasons why the writ should be denied 2

1. The warrantless, electronic interception by state agents of a conversation between petitioner and a police informant in petitioner's backyard does not constitute an unreasonable interception of petitioner's private communications in violation of the fourth amendment to the United States Constitution. 2

2. The State court's application of a state statute, previously upheld by this court as constitutional, does not violate the Eithth and Fourteenth Amendments to the United States Constitution. 2

Conclusion 9
Appendix

1. Opinion of the Supreme Court of Florida A1

2. Order denying Petitioner's Motion for Rehearing A4

3. Section 921.141, Florida Statutes (1979) A5

CITATIONS

Hill v. State, 422 S. 2d 816 (Fla. 1982) 3, 5

Hoffa v. U.S., 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed. 2d 374 (1966) 6, 7

Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed. 913 (1976) ... 8

Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed. 2d 341 (1974) 2

U.S. v. Coceres, 440 U.S. 741, 99 S.Ct. 1465, 59 L.Ed. 2d 733 (1979) 7

U.S. v. White, 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed. 2d 453 (1970) 6, 7

OTHER AUTHORITIES

FLORIDA STATUTES §921.141 A5, 3

RULES OF THE SUPREME COURT OF THE UNITED STATES 2

IN THE

SUPREME COURT OF THE UNITED STATES

No. 82-5977

JAMES DOUGLAS HILL,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONDENT's BRIEF IN OPPOSITION

The Respondent, the State of Florida, by and through the undersigned Assistant Attorney General, respectfully requests that this Court deny the petition for writ of certiorari.

OPINION BELOW

Petitioner seeks review of a decision of the Supreme Court of Florida imposing the death penalty. That opinion is reported at 422 So.2d 816 (Fla. 1982).

JURISDICTION

The jurisdiction of this Court is sought to be invoked by Petitioner under Section 1257(3), Title 28, United States Code. It is Respondent's position that the issues raised here are not such as should be reviewed by this Court. Review by writ of certiorari is a matter of sound judicial discretion, and

will be granted only where there are special and important reasons therefore. See Rule 19, Rules of the Supreme Court of the United States; Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed. 2d 341 (1974).

QUESTIONS PRESENTED

1. Whether the warrantless, electronic interception by state agents of a conversation between petitioner and a police informant in petitioner's backyard constitutes an unreasonable interception of petitioner's private communications in violation of the fourth amendment to the United States Constitution.

2. Whether the state court's application of a state statute, previously upheld by this court as constitutional, violates the Eighth and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the United States Constitution:

> "The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be siezed."

2. The Eighth Amendment to the United States Constitution:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

3. The Fourteenth Amendment to the United States Constitution:

> "SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. SECTION 921.141, Fla. Stat. (1979), set forth in the Appendix as A5 .

STATEMENT OF THE CASE

Respondent would rely on the facts as set forth in the Florida Supreme Court opinion reported as Hill v. State, 422 So.2d 816 (Fla. 1982).

On the afternoon of June 23, 1980, the victim (Rosa Lee Parker), young Tina and Tammy Deal, and Russell Jackson went skating. Afterwards, they returned to the Deals' home. Later in the evening, Rosa Lee asked Tammy Deal to accompany her to a nearby schoolyard to play, but Tammy's mother would not permit it. Rosa Lee then left alone, headed toward the school. This was the last time anyone saw Rosa Lee alive. On June 25, 1980, authorities retrieved her partially clad body from an area known as the "Pits" in Hillsborough County. The medical examiner determined the cause of death to be mechanical asphyxiation. The state charged petitioner with the first degree murder of Rosa Lee.

Russell Jackson testified at trial that on the same evening of Rosa Lee's death, petitioner asked him if he wanted to help rape the victim, and, if he did, petitioner would take her somewhere afterwards and "get rid of her." Another of petitioner's friends, Daniel Munson, testified that, early in the evening of the murder, petitioner came to his house on a motorcycle, accompanied by a female whom Munson could not identify. Munson would not let Hill enter his home, and petitioner and the female left. Munson further testified that Hill returned to his home about midnight that same evening, said that "he had the nerve to hurt someone," and took Munson to see Rosa Lee Parker's dead body. While viewing the body, petitioner boasted, "she wouldn't give it up, so I had to take it."

Munson related this information to police during an initial investigation. Pursuant to an agreement with authorities to drop pending charges, Munson went to petitioner's home wired with electronic surveillance equipment for the purpose of eliciting incriminating statements from petitioner. Munson persuaded Hill to accompany him into the backyard and there obtained statements in which petitioner admitting committing the murder. Munson testified at trial concerning those statements and the state introduced, over objection, both the police recording of the conversation and the testimony of the officers who overheard the conversation by way of the surveillance equipment.

Petitioner was charged by indictment filed July 9, 1980,

with first degree murder. (R 5) A motion to suppress evidence of the tape recorded conversation between petitioner and Munson was filed and denied on October 21, 1980. (R 12, 13)

At the conclusion of a jury trial held November 3 through November 6, 1980, petitioner was found guilty as charged. (R 26) He was sentenced to death in accordance with the jury's recommendation on November 7, 1980. (R 27, 31) The court found two aggravating factors, (1) that the murder was heinous, atrocious, and cruel, and (2) that it was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, and one mitigating factor, that petitioner had no significant criminal history. A motion for new trial was denied on October 21, 1980. (R 12, 13)

The Florida Supreme Court affirmed the lower court's judgment and sentence on July 15, 1982. Hill v. State, 422 So.2d 816 (Fla. 1982). The court also denied a subsequent motion for rehearing. (A 4)

REASONS WHY THE WRIT SHOULD BE DENIED

ISSUE I

THE WARRANTLESS, ELECTRONIC INTERCEPTION BY STATE AGENTS OF A CONVERSATION BETWEEN PETITIONER AND A POLICE INFORMANT IN PETITIONER'S BACKYARD DOES NOT CONSTITUTE AN UNREASONABLE INTERCEPTION OF PETITIONER'S PRIVATE COMMUNICATIONS IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The police informant in this case, Daniel Munson, is a friend of the petitioner. Munson, in exchange for resolution

of charges pending against him, agreed to work as an agent at the direction of law enforcement officers to provide evidence of petitioner's involvement in the murder of Rosa Lee Parker. Munson went to petitioner's home wired with electronic surveillance equipment. He persuaded Hill to accompany him into the backyard, and there obtained statements in which petitioner admitted committing the murder. Munson testified concerning these statements at trial and the state introduced, over objection, both the police recording of the conversation and the testimony of the officers who overheard the conversation by way of the surveillance equipment. Petitioner contends that the electronic interception of the conversation in his enclosed backyard violated his rights under the fourth amendment to the United States Constitution.

This Court has held that a defendant does not have a justifiable and constitutionally protected expectation that a person with whom he is conversing will not reveal the conversation to the police either then, by means of electronic equipment, or later. U. S. v. White, 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed 2d 453 (1970); Hoffa v. U.S., 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed. 2d 374 (1966).

White addressed the issue of whether the fourth amendment bars from evidence the testimony of govermental agents who related certain conversations which had taken place between White and an informant in the defendant's home and which the

officers had overheard by monitoring the frequency of a radio transmitter carried by the informant. In holding that this evidence should not be barred, the Court reiterated its holding in Hoffa that no matter how strongly a defendant trusts an apparent colleague, his expectations in this respect are not protected by the fourth amendment when it happens that his collegue is a government agent reporting regularly to the authorities.

More recently, in U.S. v. Coceres, 440 U.S. 741, 99 S.Ct. 1465, 59 L.Ed. 2d 733 (1979), the Supreme Court reaffirmed its position in White that no fourth amendment rights are violated by an undercover agent carrying radio equipment which transmitted the conversations with defendant to either recording equipment or to officers monitoring the transmitting frequency. The Court held that "[n]either the Constitution nor any Act of Congress requires that official approval be secured before conversations are overheard or recorded by Government agents with the consent of one of the conversants." [Footnote omitted.] 440 U.S. at 744, 99 S.Ct. at 1467.

In the present case, the monitoring of the conversation between petitioner and Munson was not a violation of the fourth amendment to the United States Constitution.

ISSUE II

THE STATE COURT'S APPLICATION OF A STATE STATUTE, PREVIOUSLY UPHELD BY THIS COURT AS CONSTITUTIONAL, DOES NOT VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Petitioner contends that the state court's application of the death penalty statute violated the Eighth and Fourteenth Amendments of the United States Constitution. In particular, petitioner claims that the trial court improperly doubled up aggravating circumstances, making the death penalty inappropriate.

The right to seek certiorari in the Supreme Court to review a state court judgment is a matter of sound judicial discretion and will be granted only where there is a substantial federal question presented which has previously been raised in the state courts and the state court judgment cannot be sustained on an independent ground of state law. Mr. Justice Brennan, "State Court Decisions and the Supreme Court", 31 Penn. Bar Assn. Q. 393, 399-400 (1960).

In Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed. 2d 913 (1976), this Court had an opportunity to review Florida's death penalty statute and held that the capital - sentencing procedures passed constitutional muster. Petitioner's claim that the state courts improperly applied state law does not present a substantial federal question.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted

JIM SMITH
ATTORNEY GENERAL

Theda James Davis

THEDA JAMES DAVIS
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished, by U.S. Mail to Barry Rosenstein, Attorney for Petitioner, 2431 Riverbluff Parkway, Sarasota, FL 33581, on this 31st day of January, 1983.

Theda James Davis
OF COUNSEL FOR RESPONDENT

IN THE

SUPREME COURT OF THE UNITED STATES

No. 82-5977

JAMES DOUGLAS HILL,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE
SUPREME COURT OF FLORIDA

APPENDIX

		PAGE
1.	Opinion of the Supreme Court of Florida	A1
2.	Order denying Petitioner's Motion for Rehearing	A4
3.	Section 921.141, Florida Statutes (1979)	A5

gating factors we set aside the sentence of death and remand to the trial court to make any additional findings it may deem appropriate and to reweigh the aggravating and mitigating circumstances.

Moody additionally points out that the trial court apparently thought that it did not have authority to order a presentence investigation report when it denied Moody's request that the court order one. This appears from the following statement in the record made by the court when it denied the request. The court said, "The motion for PSI is denied. There is no statutory authority for that, and this matter will proceed to sentencing at three thirty this afternoon." Although the trial court was not required by Florida Rule of Criminal Procedure 3.710 to order a presentence investigation before sentencing Moody, it had the discretion to order one. Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert. denied, 444 U.S. 919 (1979); Thompson v. State, 328 So.2d 1 (Fla. 1976). See also In re Florida Rules of Criminal Procedure, Rule 3.710, 362 So.2d 655 (Fla. 1978). On remand, the trial court should exercise its discretion and either grant or deny the request for a PSI.

Finally, we reject Moody's challenges to Florida's death penalty statute, all of which he concedes have already been expressly or impliedly rejected by this Court.

Accordingly, Moody's conviction is affirmed, and this cause is remanded for resentencing by the trial court without an additional jury recommendation.

It is so ordered. (Adkins, Boyd, Overton, and Sundberg, JJ., Concur. McDonald, J., Concurs in part and dissents in part: "I would remand with instructions to impose a life sentence."

---

1. The court instructed:

You are further instructed that murder in the first degree is the unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of or in the attempt to perpetrate any of the following crimes: Arson, involuntary sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person over the age of 18 years when such drug is proven to be the proximate cause of the death of the user.

2. This rule has since been amended to permit collective questioning without consent. Florida Rule of Criminal Procedure 3.300(b), effective January 1, 1981, now provides:

Examination. The court may then examine each prospective juror individually or may examine the prospective jurors collectively. Counsel for both State and defendant shall have the right to examine jurors orally on their voir dire. The order in which the parties may examine each juror shall be determined by the court. The right of the parties to conduct an examination of each juror orally shall be preserved.

* * *

Criminal Law—Murder—Death Penalty—Evidence—Intercepted Communications—Tape Recording of Conversation Between Informant and Defendant Held in Defendant's Backyard Properly Admitted—Testimony of Officers Overhearing Conversation by way of Surveillance Equipment Properly Admitted—Eliciting of Defendant's Incriminating Statements by Party Acting Under Instruction of Police Not Violation of Right to Remain Silent Where Defendant not in Custody or Restricted in His Movements—Evidence of Premeditation Sufficient—Sentencing—No Improper Doubling of Aggravating Circumstances

JAMES DOUGLAS HILL, appellant, v. STATE OF FLORIDA, appellee. Supreme Court of Florida. Case No. 60,144. July 15, 1982. An appeal from the Circuit Court in and for Hillsborough County. Harry Lee Coe, III, Judge. Ronald W. Young, Tampa, Florida, for appellant. Jim Smith, Attorney General, and Michael A. Palecki, Assistant Attorney General, Tampa, for appellee.

(PER CURIAM.) This is a direct appeal from appellant's conviction of first-degree murder and, in accordance with the jury's recommendation, a sentence of death. See art. V, sec. 3(b)(1), Fla. Const. We affirm, holding that the dictates of Sarmiento v. State, 397 So.2d 643 (Fla. 1981), do not preclude the admission into evidence of appellant's confession made to an informant in appellant's backyard and recorded by police with electronic surveillance equipment.

The facts show that on June 25, 1980, authorities retrieved the dead body of twelve-year-old Rosa Lee Parker from an area known as the "Pits" in Hillsborough County. The body lay partially exposed in a shallow grave, covered with mud and hyacinths, and was clothed only in a brassiere pulled up over the breasts. The medical examiner determined the cause of death to be mechanical asphyxiation. The state charged twenty-two-year-old appellant with first-degree murder.

The testimony at trial revealed that on the afternoon of June 23, the victim, appellant, young Tina and Tammy Deal, and Russell Jackson went skating. Afterwards, they returned to the Deals' home. Later in the evening, Rosa Lee asked Tammy Deal to accompany her to a nearby schoolyard to play, but Tammy's mother would not permit it. Rosa Lee then left alone, headed toward the school. This was the last time anyone saw Rosa Lee alive.

Russell Jackson testified that on the same evening appellant asked him if he wanted to help rape Rosa Lee, and, if he did, appellant would take her somewhere afterwards and "get rid of her." Another of appellant's friends, Daniel Munson, testified that, early in the evening of the murder, appellant came to his house on his motorcycle, accompanied by a female whom Munson could not identify. Munson would not let appellant enter his home, and appellant and the female departed. Munson further testified that appellant returned to his home alone about midnight, said that "he had the nerve to hurt someone," and took Munson to see Rosa Lee Parker's dead body. While viewing the body, appellant boasted, "She wouldn't give it up, so I had to take it."

In the initial investigation, Munson related this information to the police. They persuaded him to go to appellant's home wired with electronic surveillance equipment for the purpose of eliciting incriminating statements from appellant. Munson agreed to do so after authorities promised to drop a pending burglary charge against him, drop pending parole violation charges, and not to charge him with accessory after the fact for the instant murder. Munson went to appellant's home, persuaded appellant to accompany him into the backyard, and there obtained statements in which appellant admitted committing the murder. Munson testified concerning those statements at trial and the state introduced, over objection, both the police recording of the conversation and the testimony of the officers who overheard the conversation by way of the surveillance equipment.

The jury recommended death and the trial judge imposed a death sentence. The court found two aggravating factors, (1) that the murder was heinous, atrocious, and cruel, and (2) that it was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, and one mitigating factor, that appellant had no significant

THE FLORIDA LAW WEEKLY is a publication of Judicial and Administrative Research Associates, Incorporated, 1327 North Adams Street, Post Office Box 4284, Tallahassee, Florida 32303. Phone (904) 222-3171.

to a violation of article I, section 12, but I will resist that temptation and restrict the application to the unreasonable interception.

In Odom we held the error harmless because the tape was merely cumulative. We can't say that the admission of the tape here was harmless. It played a significant role in the trial and was frequently discussed by witnesses and the prosecutor. Information gained from it was used in rebuttal.

This case should be remanded for a new trial.

II.

I also dissent from the imposition of the death penalty in this case. That sentence was predicated upon a finding that the crime was heinous, atrocious, and cruel and that the murder was committed in a cold, calculated, and premeditated fashion without any pretense of legal or moral justification. I disagree that either of these elements was proved beyond a reasonable doubt. I will concede that an inference of each exists, but aggravating factors must be proved beyond a reasonable doubt and that degree of proof is not met here. Since there is one mitigating factor and the proof of aggravation is insufficient, only a life sentence should be imposed should this conviction stand.

(Sundberg, J., Concurs as to part I only.)

* * *

Criminal Law—Robbery—Murder—Death Penalty—Statements Voluntarily Made by Defendant to Police Officers After Counsel had Been Retained Properly Admitted—Search and Seizure—Third-Party Consent to Search of Apartment Valid Where Party has Joint Access and Control of Entire Premises—No Error in Trial Court's Finding that Defendant Competent to Stand Trial or Jury Verdict Rejecting Defendant's Claim of Insanity at Time of Offense—Evidence—Testimony Placing Defendant at Scene of Separate Homicides Properly Admitted as Being Relevant to Identity—Defendant's Theory of Robbery not "Reasonable" so as to Negate Circumstantial Evidence—Argument—No Improper Comment on Defendant's Failure to Testify—Sentencing—Resentencing—Aggravating and Mitigating Circumstances—Person on Probation not "Person Under Sentence of Imprisonment"—Improper to Use Insanity Test as Standard in Determining Mitigating Circumstances Relating to Emotional Disturbance—Trial Court has no Jurisdiction to Consider Post Trial Motion Regarding Right to Have Execution Televised

JOHN ERROL FERGUSON, Appellant, v. STATE OF FLORIDA, Appellee. Supreme Court of Florida. Case No. 55,498. July 15, 1982. An appeal from the Circuit Court in and for Dade County. Richard S. Fuller, Judge. Michael S. Hacker of Hacker, Phelps and Matters, Miami, for appellant. Jim Smith, Attorney General, and Margarita Esquiroz, Assistant Attorney General, Miami, for appellee.

(ADKINS, J.) Appellant, John Errol Ferguson, was found guilty on two counts of first-degree murder, one count of involuntary sexual battery, one count of robbery, one count of attempted robbery, one count of unlawful possession of a firearm while engaged in a criminal offense, and one count of possession of a firearm by a convicted felon. He now appeals his convictions on the above and the resulting sentences of death and imprisonment. We have jurisdiction. Art. V, sec. 3(b)(1), Fla. Const.

Brian Glenfeld and Belinda Worley were last seen leaving a Youth for Christ meeting around 9:00 p.m. on Sunday, January 8, 1978. The two seventeen-year-olds were supposed to meet friends at an ice cream parlor. The next morning their bodies were discovered in a wooded area by two passersby.

Brian's body was behind the wheel of the car. He'd been shot in the chest and arm. A bullet to the head had killed him. Belinda's body was several hundred yards away in a dense growth. All she had on were her jeans; her other clothes were next to her body. She'd been shot in the back of the head. An autopsy indicated she'd been raped.

Brian's father testified that Belinda was wearing two rings, a gold bracelet and a pair of earrings when she and Brian left on Sunday evening. None of the jewelry was found with the bodies. Belinda's earlobe was torn where an earring had been taken. Brian's empty wallet was found in Belinda's purse near her body. His father had seen both the wallet and some cash in Brian's possession the previous evening.

On April 5, 1978, the defendant was arrested at his apartment pursuant to a warrant for unlawful flight to avoid prosecution; he was under indictment for another multiple-murder, the so-called Carol City murders. The defendant was read his Miranda rights each time he was questioned. He signed a consent to search form and allowed the officers to search the apartment. His roommate, Virginia Polk, also consented to the search. After the search, which produced probable evidence in another robbery, the defendant confessed to killing the "two kids." At the time of his arrest he had in his possession a .357 magnum capable of firing .38 caliber bullets like those which killed Brian and Belinda.

The gun was registered to Livingston Stocker, a victim of the Carol City murders. Margaret Wooden, a survivor of that incident, testified that the defendant had been in Stocker's Carol City house on July 27, 1977, the night he was murdered.

The defendant was convicted on two counts of first degree murder. The jury recommended the death penalty and the judge concurred in imposing the death sentence.

We reject the constitutional challenges to the death penalty. It is neither cruel and unusual punishment, Gregg v. Georgia, 428 U.S. 153 (1976), nor a violation of due process or equal protection. Proffitt v. Florida, 428 U.S. 242 (1976).

The trial court denied defendant's pre-trial motions to suppress statements made on April 5, 1978, the day of his arrest. Evidence at the suppression hearing showed that defendant was represented by counsel as of about 3:00 p.m. the day he was taken into custody. Defendant's attorney visited his client and claimed that he advised the officers involved that he didn't want anyone talking to his client unless he was present. This was contradicted by the state's evidence and the trial court found that such communication did not take place. The defendant was questioned at least twice after this and admitted the crimes without his attorney being present.

The trial judge in the case before us specifically found that the defendant knowingly and voluntarily waived his Fifth Amendment right. Witt v. State, 342 So.2d 497 (Fla.), cert. denied, 434 U.S. 935 (1977). The waiver is effective even though the defendant is represented by counsel and the officers are aware of that fact. United States v. Brown, 569 F.2d 236 (5th Cir. 1978); United States v. Vasquez, 476 F.2d 730 (5th Cir. 1973). The defendant in this case was questioned by three different officers investigating three separate incidents. Each time he was approached, the defendant was advised of his rights and clearly consented to talking without an attorney. When he finally did ask to

THE FLORIDA LAW WEEKLY is a publication of Judicial and Administrative Research Associates, Incorporated.
1327 North Adams Street, Post Office Box 4284, Tallahassee, Florida 32303. Phone (904) 222-3171.

Supreme Court of Florida

TUESDAY, OCTOBER 5, 1982

JAMES DOUGLAS HILL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 60,144

Circuit Court No. 80-5690
(Hillsborough)

Upon consideration of the Motion for Rehearing filed in the above cause by attorney for Appellant,

IT IS ORDERED that said Motion be and the same is hereby denied.

ALDERMAN, C.J., ADKINS, BOYD, OVERTON and EHRLICH, JJ., concur
McDONALD, J., dissents

RECEIVED
OCT 7 1982
DEPT. OF LEGAL AFFAIRS
TAMPA

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

Darlya Carnell
Deputy Clerk

TC
cc: Hon. James T. Taylor, Jr., Cle
Hon. Harry Lee Coe, III, Judg

Ronald W. Young, Esquire
Michael A. Palecki, Esquire

CHAPTER 921

SENTENCE

921.09 Fees of physicians who determine sanity at time of sentence.
921.12 Fees of physicians when pregnancy is alleged as cause for not pronouncing sentence.
921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.
921.143 Appearance of victim to make statement at sentencing hearing; submission of written statement.
921.15 Stay of execution of sentence to fine; bond and proceedings.
921.16 When sentences to be concurrent and when consecutive.
921.161 Sentence not to run until imposed; credit for county jail time after sentence; certificate of sheriff.
921.18 Sentence for indeterminate period for noncapital felony.
921.185 Sentence; restitution a mitigation in certain crimes.
921.20 Classification summary; Parole and Probation Commission.
921.21 Progress reports to Parole and Probation Commission.
921.22 Determination of exact period of imprisonment by Parole and Probation Commission.
921.231 Presentence investigation reports.
921.241 Felony judgments; fingerprints required in record.

921.09 Fees of physicians who determine sanity at time of sentence.—The court shall allow reasonable fees to physicians appointed by the court to determine the mental condition of a defendant who has alleged insanity as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

History.—s. 255, ch. 19554, 1939; CGL 1940 Supp. 8663(264); s. 121, ch. 70-339.

921.12 Fees of physicians when pregnancy is alleged as cause for not pronouncing sentence.—The court shall allow reasonable fees to the physicians appointed to examine a defendant who has alleged her pregnancy as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

History.—s. 258, ch. 19554, 1939; CGL 1940 Supp. 8663(267); s. 122, ch. 70-339.

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present arguments for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose

Best Copy Available

sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

History.—s. 237a, ch. 19554, 1939; CGL 1940 Supp. 8663(246); s. 119, ch. 70-339; s. 1, ch. 72-72; s. 9, ch. 72-724; s. 1, ch. 74-379; s. 248, ch. 77-104; s. 1, ch. 77-174; s. 1, ch. 79-353.

Note.—Former s. 919.23.

921.143 Appearance of victim to make statement at sentencing hearing; submission of written statement.—

(1) At the sentencing hearing, and prior to the imposition of sentence upon any defendant who has pleaded guilty or nolo contendere to any crime, the sentencing court shall permit the victim of the crime for which the defendant is being sentenced to:

(a) Appear before the sentencing court for the purpose of making a statement under oath for the record; or

(b) Submit a written statement under oath to the office of the state attorney, which shall be filed with the sentencing court.

(2) The state attorney or any assistant state attorney shall advise all victims that statements, whether oral or written, shall relate solely to the facts of the case and the extent of any injuries, financial losses, and loss of earnings directly resulting from the crime for which the defendant is being sentenced.

(3) The court may refuse to accept a negotiated plea and order the defendant to stand trial.

History.—ss. 9, 10, ch. 76-274.

921.15 Stay of execution of sentence to fine; bond and proceedings.—

(1) When a defendant is sentenced to pay a fine, he shall have the right to give bail for payment of the fine and the costs of prosecution. The bond shall be executed by the defendant and two sureties approved by the sheriff or the officer charged with execution of the judgment.

(2) The bond shall be made payable in 90 days to the governor and his successors in office.

(3) If the bond is not paid at the expiration of 90 days, the sheriff or the officer charged with execution of the judgment shall indorse the default on the bond and file it with the clerk of the court in which the judgment was rendered. The clerk shall issue an execution as if there had been a judgment at law on the bond, and the same proceedings shall be followed as in other executions. After default of the bond, the convicted person may be proceeded against as if bond had not been given.

History.—s. 260a, ch. 19554, 1939; CGL 8426, 8427; CGL 1940 Supp. 8663(270); s. 123, ch. 70-339.

921.16 When sentences to be concurrent and when consecutive.—

(1) A defendant convicted of two or more offenses charged in the same indictment, information, or affidavit or in consolidated indictments, informations, or affidavits shall serve the sentences of imprisonment concurrently unless the court directs that two or more of the sentences be served consecutively. Sentences of imprisonment for offenses not charged in the same indictment, information, or affidavit shall be served consecutively unless the court directs that two or more of the sentences be served concurrently.

(2) A county court or circuit court of this state may direct that the sentence imposed by such court be served concurrently with a sentence imposed by a court of another state or of the United States. In

criminal history.

Trial Phase

Appellant raises three points dealing with the trial phase: (1) The tape recording and the officers' testimony of appellant's statements were obtained in violation of this Court's decision in State v. Sarmiento, 397 So.2d 643 (Fla. 1981); (2) because Munson was acting pursuant to police instructions, he was an arm of the police department, and the statements he obtained were a violation of Miranda v. Arizona, 384 U.S. 436 (1966); and (3) there was not sufficient evidence as a matter of law to prove premeditation.

Appellant first argues that the trial court committed reversible error in not suppressing the officers' testimony and the tape-recorded conversation between Munson and appellant. In State v. Sarmiento, we held that "the warrantless, electronic interception by state agents of a conversation between defendant and an undercover police officer in defendant's home [was] an unreasonable interception of defendant's private communications in violation of article I, section 12, Florida Constitution." 397 So.2d at 644. We based our decision on the principle that one enjoys a reasonable expectation of privacy in one's own home and that it is unreasonable to expect that others not privy to an in-home conversation will be listening in through electronic surveilling equipment. We concluded in Sarmiento that the tape recording and the testimony of officers listening to the surveilling devices were not admissible against the homeowner.

The instant case is, however, distinguishable from Sarmiento because the instant tape recording was of a conversation which occurred in appellant's backyard, not in the home. We refuse to extend the reasoning in Sarmiento and the protections of article I, section 12, beyond the four walls of the home. We note Odom v. State, 403 So.2d 936 (Fla. 1981), is also distinguishable from our holding in the instant case because that interception was in the home.

Because of mischaracterizations of our opinion in Sarmiento, we also feel that it is necessary to emphasize two points. First, Sarmiento does not prohibit an undercover officer or any other person who is privy to an in-home conversation from testifying about statements made therein. Second, the opinion does not prohibit the use of electronic surveilling devices by undercover officers in the home as long as a warrant has issued by the appropriate judicial officer.

Appellant's second contention is that, because Munson was acting under police instruction, appellant's statement made to Munson must be suppressed because the dictates of Miranda v. Arizona were not satisfied. This argument is without merit. Miranda only applies to instances of custodial interrogation; appellant was not in custody, nor was his freedom of movement restricted in any manner. See United States v. White, 401 U.S. 745 (1971); Hoffa v. United States, 385 U.S 293 (1966).

In a third point, appellant argues that there was insufficient evidence, as a matter of law, to prove premeditation. At appellant's trial, the state proved premeditation through the testimony of two witnesses. Russell Jackson testified that appellant asked him to come and help rape the victim and that, if he did, appellant would later "get rid of her." Munson testified that appellant told him why he raped and murdered the victim: "She wouldn't give it up so I had to take it." We are satisfied that the evidence presented at trial is sufficient to support appellant's guilt of first-degree premeditated murder beyond a reasonable doubt. Phippen v. State, 389 So.2d 991 (Fla. 1980); Spinkellink v. State, 313 So.2d 666 (Fla. 1975).

Sentencing Phase

Appellant contends that the trial court, in the penalty phase improperly doubled up aggravating circumstances, making the death penalty inappropriate. The trial court found two aggravating factors: The murder was heinous, atrocious, and cruel, and the murder was committed in a cold, calculated, and premeditated fashion without any pretense of legal or moral justification. Appellant asserts that the trial court based its findings as to both factors on the same evidence and did not distinguish the two. This, appellant claims, was improper. We find that, although the trial court considered both aggravating factors together, the trial court's findings contained distinct proof as to each factor. The record shows that appellant committed the rape and murder in such a fashion as to make it especially heinous, atrocious, and cruel. Further, the record shows that appellant's state of mind was such that he intended to rape and then murder the victim and that he made this decision substantially before the time that he picked her up. We conclude that this supports the finding that the murder was committed in a cold and calculated manner without pretense of moral or legal justification. The sentence of death was proper. See Buford v. State, 403 So.2d 943 (Fla. 1981); LeDuc v. State, 365 So.2d 149 (Fla. 1978), cert. denied, 444 U.S. 885 (1979); Hoy v. State, 353 So.2d 826 (Fla. 1977), cert. denied, 439 U.S. 920 (1978).

Accordingly, finding no reversible error, appellant's conviction and sentence of death are affirmed.

It is so ordered. (Alderman, C.J., Adkins, Boyd, Overton and Ehrlich, JJ., Concur. McDonald, J., Dissents with an opinion, in which Sundberg, J., Concurs as to part I only. Sundberg, J., Dissents.)

McDONALD, J., dissenting:

I.

It was reversible error to allow the introduction of the tapes of conversation between Munson and Hill. A comparable factual circumstance existed in Odom v. State, 403 So.2d 936 (Fla. 1981). There, one Gerald Jones, in cooperation with the police, wore a hidden transmitter and engaged Odom in a conversation in his home in which he made incriminating statements which the police recorded. We held that the admission of the tape into evidence was error under the constitutional rule excluding evidence obtained in violation of article I, section 12 of the Florida Constitution. When Munson agreed to elicit information from Hill in consideration for the state's dismissing charges against him, he became an agent of the state. He allowed a body bug to be planted on him and surreptitiously recorded the private conversation during which he caused Hill to discuss the homicide. This was an unreasonable interception of a private conversation and as such was proscribed by article I, section 12 of the Florida Constitution.

Had Hill been indicted at the time the conversations took place, all evidence of the conversation would be excluded because there would have been a sixth amendment violation. Massiah v. United States, 377 U.S. 201 (1964). See also United States v. Henry, 100 S.Ct. 1083 (1980). While that factor does not exist here, and we are not considering a sixth amendment violation, the language of Massiah and Henry suggests that courts should look with a critical eye at statements deliberately elicited by prosecutorial authority. See Malone v. State, 390 So.2d 338 (Fla. 1980). Because of that fact I would be inclined to raise the entire conversation

THE FLORIDA LAW WEEKLY is a publication of Judicial and Administrative Research Associates, Incorporated.
1327 North Adams Street, Post Office Box 4284, Tallahassee, Florida 32303 Phone (904) 222-3171.